IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/09/2003

CORAM

THE HONOURABLE MR JUSTICE A.K.RAJAN

Writ Petition No. 7087 of 2000

M/s. Carewell Pharma
rep. by its Managing Partner,
Mr.V.Chandrasekaran,
No.9, Nagi Reddy Garden,
Guindy, Chennai-32. ... Petitioner.

-Vs-

The Managing Director,
Tamil Nadu Medical Services
Corporation Limited (TNMSC),
No.417, II Floor, Pantheon Road,
Chennai-8. ... Respondent

Prayer: Petition under Article 226 of the Constitution of India praying for the issue of a writ of certiorarified mandamus as stated therein.

For Petitioner : Ms. Hemalatha

For Respondent : Mr.Shivakumar.

:ORDER

This writ petition has been filed for the issue of a writ of certiorarified mandamus to call for the records relating to order in Ref.No.17817/tnmsc/qc/99-2000 dated 4.10.1999 and the consequential order passed in qcd No.0005/tnmsc/qc/99-2000 dated 22.10.1999 on the file of the respondent, quash the same and direct the respondent to pay the values for the supply of drugs made by the petitioner.

2. The relevant facts for the purpose of disposal of this writ petition is as follows:-
The petitioner is a registered firm, which produces pharmaceutical drugs. The petitioner manufactures drugs from the year 1987 onwards. The respondent placed orders for the supply of co-trimoxazole suspension in P.O.Nos.F0253 dated 6.8.1996, F0477 dated 23.9.1997 and F0727 dated 20.10.1997. Pursuant to the above supply orders, the petitioner supplied the same to the respondent and delivered it to various places at Dindigul, Pudukottai, Trichy, Kancheepuram and Coimbatore wear houses and all the

supplies were effected before December 1997. As per their Rules, the petitioner also had control sample bottles for each batch. While so, on 27.7.1999, the respondent sent a show cause notice complaining that the supply of the syrup, Cotrimoxazole, in batch Nos. L055, L056, L066 and L073, were not of standard quality and further alleged that the said supplies observed colour changes with unpleasant odour. Immediately the petitioner had the analysis done at M/s. MICAL and the report revealed that there was no such defect as alleged by the respondent. The petitioner sent a letter on 1 1.8.1999 and informed that the supplies were of standard quality and offered to replace the colour changed bottles. However, the respondent sent a letter on 7.9.1999 and again on 4.10.1999 blacklisting the petitioner from entering into the contract for supply of cotrimoxazole suspension for a period of five years. Further, by letter dated 2 2.10.1999, the respondent ordered deduction of Rs.3,78,820.80 being the total value of the supplies made by the

petitioner. The petitioner sent a letter dated 14.10.1999 requesting for cancellation of the orders, but no reply was received. Therefore, the present writ petition has been filed.

3. In the counter affidavit filed by the respondent, it is stated that the respondent is the nodal agency set up by the Government of Tamil Nadu to procure the essential drugs. The respondent placed orders with the petitioner for the supply of co-trimoxazole suspension in P.O.Nos.F0253 dated 6.8.1996, F0477 dated 23.9.1997 and F0727 dated 2 0.10.1997. These orders were all effected in terms of the tender notification. The respondent placed orders for supply of cotrimoxazole vide several purchase orders. Pursuant to the same, supplies have been effected from December 1997 and delivered at various wear houses. It is further stated in the counter affidavit that it is true, the respondent issued a show cause notice dated 27.7.1999, since they found that the supplies were not of standard quality, as the same had observed colour changes with unpleasant odour. Being the public body, the respondent must ensure that the drugs and medicines supplied to them are of standard quality. The action initiated against the petitioner is only in public interest and there was no violation of the principles of natural justice. It is further stated in the counter affidavit that according to the conditions of supply, the goods that were supplied should be valid and usable till 31.9.2000. But even before the due date, the said syrup was found to be a sub standard quality. The supplies, that were sent for analysis, confirmed the failure of the standards of the batches referred therein, as it found to contain fungal group. Therefore, the respondent has passed the order in accordance with the terms and conditions of tender.

4. The learned counsel appearing for the petitioner submitted that the petitioner delivered 88,300 bottles of suspension on various dates , viz., on 6.8.1997, 23.9.1997 and 20.10.1997. But, only after 1= years from the date of supply of the said medicine, test had been conducted and according to the petitioner, there were only 3,119 bottles were returned to the petitioner. So, the balance of 85,181 bottles have already been used by the respondent. When that be the case, the impugned order of not only blacklisting the petitioner for supply of the medicine, co-trimoxazole suspension, for a period

of five years, but also deducting the entire price for the entire 88,300 bottles, is not justifiable. The learned counsel for the petitioner further submitted that the petitioner do not admit the test report relied upon by the respondent to show that the samples failed. In fact, the samples, that were kept under their custody, were sent to the Government approved laboratories on 2.8.1999 and on 30.7.1999, subsequent to the alleged test by the respondent and in the month of August 1999 , the petitioner sent a letter to the respondent enclosing the Analyst's reports, which show that the said samples were not defective. Therefore, the petitioner do not accept the conclusion of the Government Analyst's report with respect to the samples sent by the respondent and therefore, the impugned order is liable to be set aside.

5. The learned counsel for the respondent submitted that as per the conditions of tender and as per the Rules of the Drugs and Cosmetics Act, every drug must contain the date of expiry in the bottle itself and during the entire period till the date of expiry, the samples must satisfy the test, if conducted on any date prior to the date of expiry mentioned in the bottle. If the test failed, then as per Clause 42 of the Conditions of Tender for the Supply of Drugs and Medicines to the Tamil Nadu Medical Services Corporation, the respondent is entitled to recover the entire amount of the entire batch, even if it was already paid. Therefore, the impugned order is perfectly valid and there is no infirmities at all.

6. It is true that the tenders were accepted by the petitioner to supply co-trimoxazole. According to the petitioner and the respondent, the oral suspension was to be valid for three years. According to the petitioner, the said drug has not been mentioned in Schedule P. With respect to those drugs, which are not mentioned in the Schedule P, the maximum expiry period is sixty months as per Rule 96 of the Drugs and Cosmetics Rules. This particular drug, viz., cotrimoxazole, is not mentioned in the Schedule P. Therefore, it has to be presumed that the expiry limit is five years. But admittedly, according to the petitioner and the respondent, this drug, that was supplied, was having a life period of only three years. Be that as it may, admittedly, in the labels, the expiry period was printed as upto 2000 . But the test was conducted in the month of July 1999. According to the respondent, the analysis of the drugs with respect to each of the batch viz., 055, 056, 066 and 073 was conducted by the Government Analyst, who found that the samples contain fungal group in all the test results. Since the analysis was done by the Government Analyst and the Government Analyst found that the samples failed and contain fungal group, it has to be accepted as true.

7. On the contrary, the counsel for the petitioner contended that when they tested their samples, which were retained by them, they do not prove negative and it satisfied the test and hence, they do not accept the Government Analyst's report. The counsel for the petitioner further submitted that after the testing done by the petitioner, once again, the Government Analyst sent the samples for reanalysis, which also confirmed the earlier test. But, that report was not given to the petitioner. Merely because the re-analysis report was not furnished to the petitioner, it does not affect the case of the respondent.

8. This argument of the counsel for the petitioner is not acceptable for the reason that the samples were tested by one M/s. MICAL, who is said to be a "Government approved analyst". Under such circumstances, the petitioner also should have sent the samples for analysis only to the Government Analyst and not to any other Government Approved Analyst. Therefore, of the two reports, one made by the Government Analyst and another made by a Government Approved Analyst, the Court will prefer only the test report given by the Government Analyst. So, this Court prefers the report made by the Government Analyst and holds that the report given by the Government Analyst is the true reflection of the quality of the drugs that were tested. Therefore, with respect to all the batches, the test failed, when the same was conducted in the month of July 1999 and subsequently. But at the same time, it cannot be said that the drugs were not of standard quality even when they were supplied by the petitioner. But, there is no evidence or record to show that the respondent tested those supplies immediately after they were supplied. Therefore, even according to the respondent, the drugs satisfied the quality that was required to be maintained by the petitioner herein. Admittedly, out of 88,300 bottles, that were supplied by the petitioner, only 3,119 bottles were returned to the petitioner. Therefore, the petitioner is entitled to get the cost of the medicine actually consumed.

9. The learned counsel for the respondent contended that since the test failed and hence the drugs that were supplied were of substandard quality, the respondent has the right to recover or deduct the cost of the entire supply made by the petitioner. For that he relies upon Clause 42 of the agreement, which reads as follows:-

"If any articles or things supplied by the tenderer have been partially or wholly used or consumed after supply and are subsequently found to be in bad order, unsound, inferior in quality or description or are otherwise faulty or unfit for consumption, then the contract price or prices of such articles or things will be recovered from the tenderer, if payment had already been made to him. Otherwise the tenderer will not be entitled to any payment whatsoever for such article. For infringement of the stipulations of the contract or for other justifiable reasons, the contract may be terminated by the Managing Director, Tamil Nadu Medical Services Corporation Limited and the tenderer shall be liable for all losses sustained by the Tamil Nadu Medical Services Corporation Limited, in consequence of the termination which may be recovered from the security deposit made by the tenderer or other money due or become due to him. In the event of such amounts being insufficient the balance may be recovered personally from the tenderer or from his properties, as per rules."

10. It is to be seen that Clause 42 is found under the caption " Penalties". So, it is the penalty imposed for supplying drugs, which is not to the satisfaction of the standards. As held by the Privi Council in the case reported in AIR 1929 P.C. 179 = 30 L.W.281 and followed by the Supreme Court, the effect of Section 74 of the Indian Contract Act is to disentitle a party "to recover simplicitor the sum fixed in the contract whether penalty or liquidated damages". Therefore, Clause 42, which is a penalty clause, cannot be enforced. The respondent will be entitled only for a compensation for the loss actually sustained by him. Since it is a contract between the parties, the affected party is entitled only for a reasonable damages for the breach of

contract as held by the Supreme Court in OIL AND NATURAL GAS CORPORATION LIMITED -vs- SAW PIPES LTD (2003) 5 SUPREME COURT CASES 7 05). Therefore, the respondent is not entitled to recover the entire cost for the entire 88,300 bottles. Therefore, insofar as the order passed on 22.10.1999 is concerned, the said order is not legally sustainable and hence, it has to be set aside. The respondent is entitled to the loss incurred by them for these 3,119 bottles, which did not satisfy the test.

11. With respect to blacklisting of the petitioner, it has been done in accordance with Clause 24 of the Conditions, which read as follows:-

"The supplies will be deemed to be completed only upon receipt of the quality certificates from the laboratories. Samples which do not meet quality requirements shall render the relevant batches liable to be rejected. If the samples do not conform to statutory standards, the tenderer will be liable for relevant action under the existing laws and the entire stock should be taken back by the tenderer within a period of 15 days of the receipt of the letter from TNMSC. The stock shall be taken back at the expense of the tenderer. TNMSC has the right to destroy such substandard goods if the tenderer does not take back the goods within the stipulated time. The Director, Drugs Control will be informed for initiating necessary action on the tenderer and that product shall be blacklisted and no further supplies accepted from him till he is legally cleared. The tenderer shall also not be eligible to participate in TNMSC tenders for supply of such drugs for a period of five subsequent years." Inasmuch as the test failed within the period of warranty, the respondent is entitled to blacklist the petitioner. Therefore, the order passed on 4.10.1999 blacklisting the petitioner cannot be said to be illegal and hence, it is perfectly valid and is legally sustainable. Hence, the writ petition is partly allowed. With respect to the prayer to quash the order of blacklisting, it is dismissed.

Index:Yes
Internet:Yes

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To
The Managing Director,
Tamil Nadu Medical Services
Corporation Limited (TNMSC),
No.417, II Floor, Pantheon Road,
Chennai-8.